

#### Amendment.

The FDA's apparent willingness to ignore this Constitutional right gives pause as to what product or forms of advertising the FDA will next decide to lash out against.

Will Commissioner Kessler decide that he doesn't approve of coffee, or beer, or some other legal product, and propose similar restrictions on how these products can be advertised?

#### What Can You Do?

Write to the FDA. The FDA is accepting comments from the public on this issue until January 2, 1996.

Comments to the FDA should be sent to the following address:

**Dockets Management Branch (HFA-305)  
Docket No. 95N-0253  
Food And Drug Administration, Room 1-23  
12420 Parklawn Drive  
Rockville, MD 20857**

Note: If you are submitting a letter to the FDA docket as an individual citizen, only your original letter is needed. If, however, you are writing on behalf of a business, you must submit four copies, along with the original, and mail them in the same envelope to the above address.

You should also send copies of your letter to your two U.S. senators and your U.S. representative. If you don't know their names, you can call your local board of elections to find out.

#### Message Points

If you agree that FDA control of tobacco is unwarranted and illegal, you may want to use some of these points in your letter to the FDA:

- Everyone agrees that minors should not smoke or have access to tobacco products. But the regulations proposed by the FDA go way beyond the issue of youth smoking, and would interfere with tobacco companies' right to communicate with adult smokers about a legal product.

- The FDA's plan is a de facto ban on advertising because "tombstone" ads - black type on a white background - will be the only form permitted in all but a handful of publications. It is highly unlikely that an advertiser would want to purchase ads that do nothing to reinforce brand equity.

- Tobacco advertising is already regulated by the Federal Trade Commission, the Bureau of Alcohol, Tobacco and Firearms, the Justice Department and numerous state and local authorities.

- The FDA regulations would violate the First Amendment to the U.S. Constitution. The U.S. Supreme Court has clearly stated that truthful commercial speech for lawful products enjoys the protection of the First Amendment.

- FDA regulation of cigarette advertising would set a dangerous precedent for future over-regulation of other products of which Commissioner Kessler and the FDA may disapprove.

- The tobacco industry voluntarily restricts cigarette advertising within 500 feet of schools. Extending that distance to 1,000 feet will constitute a virtual ban in many urban areas. □

**The Most  
Serious  
Threat the  
Advertising  
Community has  
ever Faced...**

**The FDA's Plan  
to Regulate  
Cigarettes**

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Earlier this year, the U.S. Food and Drug Administration announced that it was asserting jurisdiction over cigarettes and smokeless tobacco products, including an unprecedented plan to regulate the marketing, labeling, distribution and sale of these products.

In announcing this plan, FDA Commissioner David Kessler outlined significant restrictions on the advertising and marketing of cigarettes which, if allowed to stand, would change forever the way in which cigarettes are marketed and sold in this country.

Commissioner Kessler claims that these severe restrictions are designed to prevent minors from smoking. Philip Morris U.S.A. strongly agrees that children should not smoke and supports efforts to stop minors from having access to cigarettes. However, we do not believe that the FDA has the legal authority to regulate cigarettes.

Congress – and only Congress – has the authority to change the FDA's mandate. In the more than 80 times that Congress has amended legislation governing the FDA's jurisdiction, it has never given the FDA any authority over the cigarette industry.

Philip Morris U.S.A., along with other members of the tobacco industry, filed a

lawsuit in federal court to overturn the FDA's action on the grounds that FDA regulation of tobacco is illegal.

Three other separate lawsuits have been filed as well: one by six trade groups including the Association of National Advertisers and the American Association of Advertising Agencies, another by the manufacturers of smokeless tobacco, and one by the National Association of Convenience Stores.

#### **What would the FDA's regulations do?**

Among other things, the FDA's regulations would:

- Prohibit the distribution of all cigarette branded promotional items, such as hats, shirts, bags, sunglasses, pens, etc.
- Limit point-of-sale advertising for cigarettes to black and white text only – no color or other visuals would be allowed.
- Prohibit cigarette brand sponsorship of all sports and cultural events.
- Ban cigarette billboards within 1,000 feet of any school or playground; all remaining outdoor advertisements for cigarettes would be limited to black and white text only.
- Require that the words, "Cigarettes – A Nicotine-Delivery Device" appear in all advertisements.
- Limit brand image advertising to adult newspapers, magazines and other periodicals in which at least 85 percent of readership is 18 years old or older, and no more than two million readers are

under 18.

- Ban all self-service displays of cigarettes at retail.
- Allow the FDA to enact an even more restrictive measure seven years after publication of the final rule, if the percentage of young people using tobacco products has not decreased by at least 50 percent since 1994.

#### **IT IS ESSENTIAL THAT THE ADVERTISING COMMUNITY EXPRESS ITS OPPOSITION TO THE FDA'S PLAN!**

The advertising community has already taken action to oppose the FDA's action. Shortly after the FDA asserted jurisdiction over cigarettes, several advertising trade groups filed a lawsuit in federal court to block the FDA's action.

But much more can be done to send the message to the FDA and to Capitol Hill that FDA regulation of cigarettes is illegal and unwarranted.

It is critical for members of the advertising community who oppose the plan to speak out against it.

We all agree that minors should not smoke. But, the FDA's action goes far beyond the issue of youth smoking and infringes on the rights of adults to make their own choices.

Also at stake is the FDA's apparent disregard for the First Amendment right to free speech. The U.S. Supreme Court has clearly stated that commercial speech for enjoys the protection of the First

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